

IN THE HIGH COURT OF GUJARAT AT AHMEDABAD

CIVIL REVISION APPLICATION No 292 of 1986

For Approval and Signature:

Hon'ble MR.JUSTICE H.H.MEHTA

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1. Whether Reporters of Local Papers may be allowed : YES
to see the judgements?
 2. To be referred to the Reporter or not? : NO
 3. Whether Their Lordships wish to see the fair copy : NO
of the judgement?
 4. Whether this case involves a substantial question : NO
of law as to the interpretation of the Constitution
of India, 1950 of any Order made thereunder?
 5. Whether it is to be circulated to the Civil Judge? : NO

BOTAD TRANSPORT

Versus

MEMAN JIKARBHAI DAUDBHAI

Appearance:

MR UM PANCHAL for MR DD VYAS for Revision-Petitioner
MR MEHUL S SHAH for MR SURESH M SHAH for Revision-
Opponent

CORAM : MR.JUSTICE H.H.MEHTA

Date of decision: 13/06/2000

ORAL JUDGEMENT

This Civil Revision Application, under Section 29(2) of the Bombay Rents Hotel and Lodging House Rates Control Act, 1947 (same will be referred to as " the Act" hereinafter for the sake of brevity and convenience), is directed against the judgment Exh. 30 dt. 1st February 1986 of District Judge, Surendranagar rendered in Regular

Civil Appeal No. 70 of 1982, whereby he was pleased to dismiss the said appeal by confirming a judgment Exh. 102 dt. 25th February, 1982 of Joint Civil Judge (J.D.), Surendranagar rendered in Regular Civil Suit No. 22 of 1977.

2. In this civil revision application, petitioner is the original defendant/tenant and opponent is the original plaintiff/landlord in Regular Civil Suit No. 22 of 1977. For the sake of convenience, the respective parties will be referred to as the plaintiff and the defendant hereafter.

3. The facts leading to this civil revision application in a nutshell can be summarized as follows:-

Admittedly, defendant is a tenant of a plaintiff for one shop situated at the place opposite to old Power Station at Surendranagar, for monthly rent at the rate of Rs.80/- per month. The plaintiff has come with a specific case that defendant is a tenant in arrears of rent for more than six months and as per his pleading, as on the date of his suit-notice Exh. 39 dt. 9th October, 1976, rent was found due for the period from 1st February, 1976 to 30th September, 1976, from defendant to plaintiff, and as per calculations, amount of rent came to be Rs.640/- which was found due on the date of notice. It is the case of the plaintiff that the defendant was not regular in paying the rent; and therefore, he, by addressing a notice Ex.39 dt. 9th October, 1976, terminated the tenancy and called upon the defendant to pay an amount of Rs. 640/- which was found due from defendant to plaintiff as on date of notice together with an amount of Rs.240/- being rent for the period from 1st October, 1976 to 1st December, 1976 which had become due after service of the notice. Plaintiff also asked defendant to hand over possession of the suit premises. Defendant neither paid arrears of rent nor handed over the possession of the suit premises to plaintiff.

Thereafter, plaintiff filed Regular Civil Suit No.22 of 1977 in the trial court praying for reliefs of decree of physical possession of suit shop and arrears of rent and also for mesne profits at the rate of Rs.80/per month for the period from 1st January, 1977 till realisation.

In that suit, defendant appeared and contested the suit by filing his written statement Ex.50, whereby he denied practically all the pleadings of the plaintiff. Thereafter, the learned Judge of the trial court framed issues at Ex.24. Both the parties led oral as well as

documentary evidence in the suit, and thereafter, the learned Judge of the trial court, after hearing of arguments of the Learned Advocates of both the parties, came to a conclusion that defendant is a tenant in arrears of rent for more than six months, and therefore, plaintiff's case falls under Section 12(3)(a) of the Act, and therefore, by rendering his judgment Exh.102 dt. 25th February, 1982, the learned Judge of the trial court decreed the suit against the defendant and in favour of the plaintiff. By his judgment, defendant was directed to hand over the possession of the suit shop within three months from the date of judgment and also to pay up arrears of rent of Rs.880/- and mesne profits at the rate of Rs.80/- per month from 1st January, 1977 till the date of eviction, less already deposited in the court.

4. Being aggrieved against and dissatisfied with said judgment Exh. 102 dt. 25th February, 1982, rendered by lower court in Regular Civil Suit No. 22 of 1977, original defendant/tenant preferred Regular Civil Appeal No. 70 of 1982 in the Court of the District Judge at Surendranagar. After hearing the arguments of the learned advocates of both the parties, learned District Judge, by rendering his judgment Exh.30 dt. 1st February, 1986, dismissed the appeal of the defendant/tenant, confirming the judgment of the trial court.

5. Being aggrieved against the dissatisfied with the said judgment Exh. 30 dt.1st February, 1986 of the District Judge, Surendranagar rendered in Regular Civil Appeal No. 70 of 1982, the original defendant-tenant has preferred this civil revision application under Section 29(2) of the Act. Here in this civil revision application, original defendant is a petitioner and original plaintiff is a opponent.

6. I have heard Shri U.M.Panchal, the learned advocate for and on behalf of Shri D.D.Vyas, the learned Senior Advocate for revision -petitioner and Shri Mehul S. Shah, the learned advocate for and on behalf of Shri S.M.Shah, the learned Advocate for revision -opponent. I have gone through the Record and Proceedings of the suit as well as the appeal, called for from the lower courts.

7. Before I deal with the arguments advanced on behalf of the rival parties, I would like to place certain legal position on record with regard to scope and ambit of Section 29(2) of the Act and the powers which can be exercised by the High Court in the present type of civil revision application.

(A) In case of HELPER GIRDHARBHAI Vs. SAIYED MOHMAD MIRASAHEB KADRI AND OTHERS reported in (1987) 3 SCC 538, Hon'ble Supreme Court has made legal position clear with regard to revisional powers of High Court to be exercised under Section 29(2) of the Bombay Rent Act. In Para 16 of said case, it has been held as follows:-

" As we read the power, the High Court must ensure that the principles of law have been correctly borne in mind. Secondly, the facts have been properly appreciated and a decision arrived at taking all material and relevant facts in mind. It must (sic not) be such a decision which no reasonable man could have arrived at. Lastly, such a decision does not lead to a miscarriage of justice. We must, however, guard ourselves against permitting in the guise of revision substitution of one view where two views are possible and the Court of Small Causes has taken a particular view. If a possible view has been taken, the High Court would be exceeding its jurisdiction to substitute its own view with that of the courts below because it considers it to be a better view. The fact that the High Court would have taken a different view is wholly irrelevant. Judged by that standard, we are of the opinion that the High Court in this case had exceeded its jurisdiction."

(B) In case of PATEL VALMIK HIMATLAL AND OTHERS vs. PATEL MOHANLAL MULJIBHAI (DEAD THROUGH LRS.), reported in (1998) 7 SCC 383, Hon'ble Supreme Court has been pleased to make legal position clear in Paras 4, 5 and 6 with regard to ambit and scope of Section 29(2) of the Act which read as under:-

4. Section 29(2) of the Bombay Rents Act as applicable to the Gujarat Amendment reads as follows:-

"29 (2). No further appeal shall lie against any decision in appeal under sub-section (1) but the High Court may, for the purpose of satisfying itself that any such decision in appeal was according to law, call for the case in which such decision was taken and pass such order with respect thereto as it thinks fit."

5. The ambit and scope of the said section

came up for consideration before this Court in *Helper Girdharbhai v. Saiyed Mohmad Mirasaheb Kadri* and after referring to a catena of authorities, *Sabyasachi Mukharji, J.* drew a distinction between the appellant and the revisional jurisdictions of the courts and opined that the distinction was a real one. It was held that the right to appeal carries with it the right of rehearing both on questions of law and fact, unless the statute conferring the right to appeal itself limits the rehearing in some way, while the power to hear a revision is generally given to a superior court so that it may satisfy itself that a particular case is decided according to law. The Bench opined that although the High Court had wider powers than that which could be exercised under Section 115 of the Code of Civil Procedure, yet its revisional jurisdiction could only be exercised for a limited purpose with a view to satisfying itself that the decision under challenge before it is according to law. The High Court cannot substitute its own findings on a question of fact for the findings recorded by the courts below on reappraisal of evidence. Did the High Court exceed its jurisdiction ?

6. The powers under Section 29(2) are revisional powers with which the High Court is clothed. It empowers the High Court to correct errors which may make the decision contrary to law and which errors go to the root of the decision but it does not vest the High Court with the power to rehear the matter and reappraise the evidence. The mere fact that a different view is possible on reappraisal of the evidence cannot be a ground for exercise of the revisional jurisdiction.

Keeping in mind the above legal position with regard to powers which can be exercised by this court in such type of civil revision application and scope of Section 29(2) of the Act, now I discuss rival contentions of both the parties.

8. At the outset, it is required to be noted that here in this case on hand, there is a concurrent finding of both the courts below on the point of defendant having become a tenant in arrears of rent for more than six months. Both the courts below have come to a definite conclusion based on legal evidence keeping in mind the legal position with regard to Section 12(3)(a) of the Act, that the plaintiff's case falls under Section 12(3)(a) of the Act.

9. Shri Mehul S. Shah, learned advocate for revision -opponent has drawn attention of this court that it is pertinent to note that though defendant preferred Regular Civil Appeal No.70 of 1982 in the District Court, Surendranagar, he had limited his arguments only on two points for which the learned District Judge has framed two points as follows :-

- (1) Whether the appellant/defendant proves that arrears of rent was tendered within one month from the date of receipt of the notice and the respondent/plaintiff refused to accept it ?
- (2) Whether the appellant/defendant proves that notice has not been served and the suit has not been filed against a real tenant ?

Learned District Judge, after perusing the record of the suit before the lower court and arguments advanced by both the parties before him, answered above two points in the negative. On reading Point No.1 mentioned above, it is crystal clear that that Point No. 1 is a pure question of fact based on evidence. Point No.2 mentioned as above is somewhat mixed question of fact and law and more or less this Point No.2 is decided on documentary evidence like receipts, notice and evidence of the defendant before the lower court.

10. I have heard the learned advocates of both the parties in detail at length. Shri Mehul S. Shah, the learned advocate appearing on behalf of revision -opponent/ plaintiff/landlord has argued that plaintiff has satisfied both the courts below that his case falls under Section 12(3)(a) of the Act. When this court made to Shri Mehul S. Shah, a query as to whether plaintiff has satisfied four conditions to prove his case under Section 12(3)(a) of the Act or not, his attention to a case of RATILAL BALABHAI NAZAR v. RANCHHODBHAI SHANKERBHAI PATEL AND OTHERS, reported in (1968) 9 GLR P.48 was drawn. In case of Ratilal Balabhai Nazar,

Division Bench of this court has held in Para 3 as follows:-

"There are four conditions which have to be satisfied in order to attract the applicability of sec.12(3)(a) and they are : (1) the rent must be payable by the month; (2) there must be no dispute regarding the standard rent or permitted increases right upto the expiration of a period of one month from the date of the notice under sec.12(2); (3) the rent must be in arrears for a period of six months or more at the date of such notice; and (4) the tenant must neglect to make payment of such arrears until the expiration of a period of one month after the date of such notice. If, in any case, these four conditions are satisfied, the landlord is entitled to obtain a decree for eviction against the tenant.

11. Shri Mehul Shah has argued that there is no dispute with regard to rent which is monthly payable. It is not the case of the defendant that rent is yearly payable, and therefore, when there is an admitted fact that rent is monthly payable, the first condition is fully satisfied.

For second condition with regard to dispute regarding the standard rent, the learned trial Judge has observed in Para 17 of his judgment. For the second condition, learned trial Judge has framed issue No.3. This issue is not pressed vide Pursis Ex.98. Even the appellate Judge has observed in Para 11 of his judgment that of course, in written statement, a contention has been raised regarding standard rent, but the same has been subsequently given up vide Ex.102. Learned advocate for the defendant has passed a Pursis stating that he does not press for said issue, and therefore, there was no dispute with regard to standard rent, and therefore, the plaintiff has satisfied the second condition also.

As regards Condition No.3 which is for arrears of rent for more than six months, there is no dispute with regard to the fact that rent was due from defendant to plaintiff for a period from 1st February, 1978 till date of notice dated 9th October, 1978. Learned Appellate Judge has appreciated the evidence on this point, and on Page 12 of his Judgment, he has observed that, as a matter of fact, in this case there is no dispute that rent was due from 1st February, 1976. Only contention taken by the defendant was that partners of the defendant firm and their Mahetaji had gone to father of the

plaintiff to pay rent which had become due, for about four to five times, but father of the plaintiff did not accept the rent. For this condition No.3, Point No.1 was framed by the learned appellate Judge and after discussing evidence which is mainly based on facts, Point No.1 has been answered in the negative, and therefore, this third condition is also satisfied by the petitioner.

The fourth condition is with regard to failure of defendant to pay the arrears of rent within one month from the date of service of notice. Admittedly, defendant did not comply with the suit notice. It is argued by Mr. Panchal that defendant has deposited all the amount of rent due before trial court passed the decree. From evidence, it is crystal clear that defendant had sufficient funds of money to pay rent but he did not pay and he has raised a dispute that father of plaintiff did not accept the rent. On that score, the lower court disbelieved the story of the defendant and that finding has been confirmed by the appellate Judge also. When the story of defendant is not believed by both the courts below, a strong presumption of neglect can arise from the factum of non-payment of arrears of rent by tenant within the prescribed period of one month as held in case of SARABHAI JESHINGBHAI CHOKSHY vs BABULAL @ CHANDULAL LALLUBHAI DARJI reported in (1972) 13 GLR P.870. In this case of Sarabhai, it has been held that it is for the tenant to rebut that presumption by leading evidence and proving conclusively the circumstances which may lead the court to hold that even though non-payment was established, there was no neglect notwithstanding the non-payment. Here in this case, defendant/tenant has not rebutted that presumption by leading any cogent evidence. On the contrary, defendant has admitted in his evidence that at the relevant time, they had sufficient balance of money on hand and that they have not taken the over-draft facility from the Bank. In spite of the fact that the defendant/tenant has sufficient balance of money, he has not paid the amount of rent due from him to plaintiff.

Thus, all the four conditions have been satisfied by the plaintiff, and therefore, both courts have come to a conclusion that case of plaintiff falls under Section 12(3)(a) of the Act.

12. As against the above arguments of Shri Mehul S. Shah, learned advocate for the revision -opponent, Shri U.M.Panchal, learned advocate for the revision-petitioner has assailed the judgment of the learned District Judge mainly on following two counts:-

(1) As defendant was required to pay education cess along with the rent and as education cess is yearly payable, the case of plaintiff cannot be said to have fallen under Section 12(3)(a) of the Act but the case of plaintiff falls under Section 12(3)(b) of the Act; and

(2) Defendant had deposited all the due amount of rent in the trial court before passing of the decree by the trial court, and therefore, defendant is entitled to have a protection of this court under Section 12(3)(b) of the Act.

13. Mr. Panchal, learned advocate for the revision opponent has argued that case of the plaintiff falls under Section 12(3)(b) of the Act because defendant had to pay education cess along with rent which was fixed by plaintiff for suit shop. He has also drawn the attention of this court on certain documentary evidence like receipts produced at Ex.41. In almost all the receipts, plaintiff has collected education cess separately but that too for particular month or period for which that receipt was issued. Shri Panchal has canvassed his argument that education cess is yearly payable, and therefore, it cannot be said that rent is payable by month. On this point, Mr. Panchal has relied on the decision in the case of MISTRY BHIKHALAL BHOVAN v. SUNNI VORA NOORMAMAD ABDUL KARIM AND OTHERS, reported in AIR 1978 GUJARAT 149. In that case, landlord had prayed for only rent claiming to be payable every month and impliedly making a statement that the only liability of the tenant is to pay rent as demanded by the landlord. In that case, facts were such that landlord did not demand any education cess in his notice and in plaint and this fact would be prima facie evidence of lack of tenant's liability to pay the education cess to his landlord who was entitled to recover it only when he happens to pay the same to the local authority, and therefore, this authority is not applicable to the present set of facts in this civil revision application. Shri Panchal has also cited one unreported judgment in the case of SOMABHAI KALIDAS PATEL v. BACHUBHAI SANKALCHAND MODI reported in 1986 G.L.H. (U.J.) 22. In that case, landlord had taken the contention that case would fall within Section 12(3)(a) of the Act as he has not claimed municipal tax and education cess. The question for consideration before that court was as to whether the tenant is liable to pay municipal tax and education cess and it was answered that if the tenant is liable to pay taxes and education cess, the case will

fall under Section 12(3)(b) of the Act and will not fall under Section 12(3)(a) of the Act even though landlord does not claim taxes and cess in the suit and it was further held that fact that tenant is liable to pay the municipal tax has already been decided by the court in earlier suit, and therefore, in that case, this court set aside judgment of appellate court holding that case is not governed by Section 12(3)(a) but the case is governed by Section 12(3)(b) of the Act.

14. Here in this case, looking to receipt vide Ex.41, it is crystal clear that defendant/tenant was paying education cess along with rent monthly and that education cess was a component of the rent. Here in this case, no rent note is produced but from the receipts vide Ex.41, a legitimate inference can be drawn that there was a contract between landlord and tenant that tenant had to pay education cess extra, every month along with rent which was required to be paid, monthly. In reply to submission made by Shri Panchal, Shri Mehul S. Shah has cited a very recent decision of this court (Y.B.Bhatt, J.) in case of MANILAL ABHAJI v SWAMI VAISHVACHARYA GURU reported in 2000(2) G.L.R. 1191. In this cited case, by following decision of Raju Kakara Sheth vs. Ramesh Prataprao Shirole reported in 1991(1) SCC 570, this court has come to a conclusion that education cess is payable by a tenant in addition to the standard rent under the rent agreement, though education cess is payable by the landlord annually, parties by agreement can quantify the amount of cess to be paid on month to month basis by the tenant (provided the amount does not exceed the tax liability of the landlord). Here in this case, admittedly, rent note is not produced but receipts produced vide Ex.41 clearly show that it was an agreement between plaintiff and defendant that defendant had to pay proportionate education cess monthwise as component of rent and accordingly he has paid every month the education cess along with rent, and therefore, as held in this cited case of Manilal Abhaji (supra), the case of plaintiff will not fall under Section 12(3)(b) of the Act.

15. It may be noted that defendant/tenant has nowhere taken a dispute with regard to education cess which is payable yearly either in reply to suit notice or in written statement. He has not led any evidence on this score. When there is no pleading, no such type of contention at this revisional stage can be taken.

16. Shri Panchal has further argued that defendant/tenant has deposited all the amount of rent due

from him to plaintiff in the trial court, before the trial court passed a decree. This is not the only requirement to be satisfied by the tenant to bring his case under Section 12(3)(b) of the Act. In case of TARABEN SAKARLAL SHAH Vs. SHAH JETHABHAI MAGANLAL reported in (1974) 15 G.L.R. P 567, this court has settled certain conditions which are required to be satisfied by the tenant who wants protection under Section 12(3)(b) of the Act. It has been held in Para 9 as follows:-

Thus, in order to claim protection under sub-clause (b) of sec.12(3) of the Act, the tenant (1) has to deposit the standard rent and permitted increases then due in court on the first day of the hearing of the suit or on or before such other day as the court may fix, and (2) thereafter, continues to pay or tenders in court regularly such rent and permitted increases till the suit is finally decided; and (3) also pays the costs of the suit as directed by the court.

17. With regard to contention of Mr. Panchal that plaintiff's case falls under Section 12(3)(b) of the Act, defendant has nowhere taken such plea or contention either in the suit notice or in the written statement. As per first requirement, if tenant wants a protection under Section 12(3)(b) of the Act, he has to deposit the standard rent or permitted increases then due in court on the first day of the hearing of the suit or on or before such other day as the court may fix. Here in this case, there is no dispute with regard to standard rent. The defendant was paying rent which he was to pay. The first date of hearing is the date of framing of the issues. It is not the case of the defendant/tenant that he deposited full amount of rent due on or before framing of the issues by the trial court. Therefore, first condition is not satisfied by the tenant.

18. Second condition is to the effect that thereafter tenant has to pay or tenders in court regularly such rent and permitted increases till suit is finally decided. As observed by appellate Judge in his judgment, defendant/tenant has not deposited an amount of rent due regularly in the trial court. The learned District Judge has given certain instances with respect to depositing amount of rent by the tenant in the trial court. As observed by this court, the tenant has not deposited rent which was becoming due, regularly in the court. He has deposited the rent at the interval of two months, three

months and even at the interval of four months. Therefore, it cannot be said that he has deposited rent regularly till suit was finally decided. Shri Mehul S. Shah, learned advocate for the revision -opponent has cited two authorities. In GANPAT LADHA vs SASHIKANT VISHNU SHINDE reported in (1978) 19 GLR Page 502, wherein the Hon'ble Supreme Court has held that the conditions mentioned under Section 12(3)(b) of the Act must be strictly observed for seeking its benefit. It is also held that Section 12(3)(b) of the Act does not create any discretionary jurisdiction in the court which provides protection to a tenant on certain conditions and these conditions are to be strictly observed by the tenant to seek the benefit of this section and therefore, conditions referred to hereinabove to bring the case under Section 12(3)(b) of the Act are mandatory in nature. Shri Mehul S. Shah has also cited second authority of MRANALINI B. SHAH & Anr. Vs. BAPALAL MOHANLAL SHAH, reported in (1978) 19 GLR Page 1090. In this case, Hon'ble Supreme Court has held that expression "regularly" used in Section 12(3)(b) of the Act is mandatory and not directory, and if payment to be made regularly, it must be made regularly and if payment is made at the interval of two, three or four months, then it cannot be considered regularly and in such type of cases, court has no discretion if provision of Section 12(3)(b) of the Act is not complied with. This second authority is squarely applicable to the facts of the present case, because in the present case, the defendant has not paid rent due "regularly" monthwise but he has paid the rent at the interval of two, three, or four months and so on, and therefore, the second condition for Section 12(3)(b) is also not satisfied by the defendant. As defendant/tenant has failed to satisfy the required mandatory conditions of Section 12(3)(b) of the Act, defendant is not entitled to have any protection of Section 12(3)(b) of the Act.

19. As held in case of Ganpat Lagha (supra), if tenant fails to fulfil the required conditions to bring case under Section 12(3)(b) of the Act, he cannot claim protection of Section 12(3)(b) of the Act and in that event, there being no protection available to the tenant, a decree of eviction would have to go against him. It is also held that Section 12(3)(b) of the Act does not create any discretionary jurisdiction of the court, but it provides protection to the tenant on certain conditions and these conditions are to be strictly observed by the tenant who seeks the benefit of this section and if statutory provisions do not go far enough to have hardship of the tenant, remedy lies in

legislature and it is not in the hand of the court, and therefore, the court has no alternative but to pass a decree of eviction against the defendant tenant. Except the above contentions, no other contentions have been taken by either of the parties.

20. Considering all the contentions taken by both the parties, this court comes to a conclusion that there is no error which goes to the root of the decision. This court is satisfied that decision arrived at by both the courts below is according to law, and therefore, this court finds no merits in this civil revision application, and therefore, this civil revision application deserves to be dismissed, and it is dismissed accordingly. Rule is discharged with no order as to costs. Interim relief granted on 28th February, 1986 stands vacated.

Date: 13/6/2000. (H.H.MEHTA, J.)
ccshah